

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>HARRY Q. WALLS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>RUBBERMAID, INC.</b>	)	Docket No. 184,221
Respondent	)	
AND	)	
	)	
<b>LUMBERMENS MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark dated May 3, 1996. The Appeals Board heard oral argument October 1, 1996.

**APPEARANCES**

Claimant appeared by and through his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by and through its attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Chris Cole of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

### **ISSUES**

Respondent has asked the Appeals Board to review the following issues:

- (1) What is the date of claimant's accident?
- (2) What is the nature and extent of claimant's disability?
- (3) What portion of the Award, if any, should be assessed against the Kansas Workers Compensation Fund?

Respondent's Application for Review also identifies as a separate issue the proper weight to be given the testimony of the vocational rehabilitation counselor. The Appeals Board has treated this issue as included with the determination regarding the nature and extent of claimant's disability. Finally, respondent initially listed compensability of the claim as an issue. At the time of oral argument respondent withdrew compensability as an issue on appeal.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the Award entered by Administrative Law Judge John D. Clark should be affirmed except as to the date of accident and with modification of the reasons for denying respondent's request to impose liability on the Workers Compensation Fund.

- (1) The Appeals Board finds the date of accident was August 8, 1993. This was the first day claimant was taken off work as a result of repetitive injuries and should be treated as the date of accident in accordance with Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P. 2d 1261 (1994). This finding represents an adjustment from the earlier finding by the Appeals Board at the time of preliminary hearing.
- (2) The Appeals Board finds claimant sustained a permanent partial general disability of 64 percent. The Appeals Board so finds for the reasons stated in the Award by the Administrative Law Judge. The findings by the Administrative Law Judge that relate to the nature and extent of disability are hereby adopted by the Appeals Board as its own for purposes of this award.
- (3) The Appeals Board agrees with the decision by the Administrative Law Judge to deny liability against the Kansas Workers Compensation Fund. However, the Award by the Administrative Law Judge suggests that there could not be Fund liability in a repetitive trauma case, consistent with the holding in Berry v. Boeing Military Airplanes, 20 Kan. App.

2d 220, 885 P. 2d 1261 (1994). The Appeals Board does not agree with this application of the Berry decision. In order to shift liability to the Fund the respondent must have knowledge of an impairment constituting a handicap and either employ or retain claimant in its employ after it has such knowledge. In addition, the respondent must show that sometime thereafter the claimant suffered additional disability either which would not have occurred but for the preexisting handicap or is contributed to by the preexisting handicap. K.S.A. 44-567. These tests may be met even in cases involving repetitive trauma.

However, the Appeals Board finds respondent has failed to meet its burden to shift liability to the Fund in this case. First, evidence does establish that claimant made respondent aware of problems he was having as early as January 1993. However, the evidence falls short of establishing respondent had knowledge at that time of a condition which would constitute a handicap. On the other hand, respondent might be considered to have knowledge of a condition constituting a handicap as of August 8, 1993, when claimant was taken off work. However, the record does not establish what, if any, additional injury claimant suffered thereafter. For those reasons the Appeals Board concludes the imposition of liability on the Kansas Workers Compensation Fund would not be appropriate in this case.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated May 3, 1996, should be, and the same is hereby, affirmed except as described above.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Harry Q. Walls, and against the respondent, Rubbermaid, Inc., and its insurance carrier, Lumbermen's Mutual Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred August 8, 1993, and based upon an average weekly wage of \$435.35 for 22.86 weeks of temporary total disability compensation at the rate of \$290.25 per week or \$6,635.12, followed by 260.57 weeks of permanent partial compensation at the rate of \$290.25, per week or \$75,630.44, for a 64% permanent partial work disability, making a total award of \$82,265.56.

As of October 31, 1996, there is due and owing claimant 22.86 weeks of temporary total disability compensation at the rate of \$290.25 per week or \$6,635.12, followed by 145.71 weeks of permanent partial compensation at the rate of \$290.25 per week in the sum of \$42,292.33 for a total of \$48,927.45, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$33,338.11 is to be paid at the rate of \$290.25 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts as its own all other portions of the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Frederick L. Haag, Wichita, KS  
Chris Cole, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director